

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE CRAY INC. DERIVATIVE
LITIGATION

No. C05-1016Z

ORDER

This document relates to:
ALL ACTIONS

This matter comes before the Court on motions to dismiss by nominal Defendant Cray Incorporated (“Cray”) pursuant to FED. R. CIV. P. 12(b)(6) for failure to comply with the pre-litigation demand requirement in RCW 23B.07.400, docket no. 18, and by the Individual Defendants¹ for failure to properly plead fraud pursuant to FED. R. CIV. P. 9(b) and failure to state claims upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6), docket no. 16.² Having reviewed the motions to dismiss, Plaintiffs’ opposition briefs, docket nos. 22 and 23, the reply briefs, docket nos. 25 and 27, and all supporting declarations and exhibits, and having heard argument on March 28, 2006, the Court now enters the following Order.

¹ The “Individual Defendants” are James E. Rottolk, Peter J. Ungaro, David R. Kieffer, Scott J. Poteracki, Kenneth W. Johnson, Burton J. Smith, Kenneth W. Kennedy, Jr., Stephen C. Kiely, Daniel C. Regis, Sally G. Narodick, Frank L. Lederman, John B. Jones, Jr., and Stephen C. Richards.

² In their motion to dismiss, the Individual Defendants join in Cray's motion to dismiss for failure to comply with the demand requirement. Docket no. 18, at 1.

1 **BACKGROUND**

2 This shareholder derivative action brings claims for breach of fiduciary duties, abuse
 3 of control, gross mismanagement, waste of corporate assets, and unjust enrichment. Verified
 4 Amended Derivative Complaint (“VADC”), docket no. 9, ¶ 1. Plaintiffs allege that these
 5 violations occurred from July 31, 2003, to the filing of the VADC on October 13, 2005
 6 (“Relevant Period”). Id. ¶ 1. Plaintiffs are shareholders of Cray who owned, and continue to
 7 own, shares of Cray’s common stock. Id. ¶¶ 11-12.

8 As alleged by Plaintiffs, “Cray is engaged in the design, development, marketing and
 9 support of high-performance computer systems, commonly known as supercomputers.” Id. ¶
 10 2. Cray is incorporated and maintains its principal place of business in Washington State.
 11 Id. ¶ 13. Generally, Plaintiffs allege that Cray’s officers and directors “knowingly
 12 misrepresented both the dynamics of Cray’s business model and the Company’s internal
 13 controls with regard to its financial reporting process.” Id. ¶ 3. More specifically, Plaintiffs
 14 allege that “[o]n March 16, 2005, Cray revealed that, commensurate with its Sarbanes-Oxley
 15 activities, it expected to document material weaknesses in its system of internal controls and
 16 also expected to report that these controls were ineffective.” Id. ¶ 5. As a result, Plaintiffs
 17 allege that on March 17, 2005, Cray’s stock lost 25.9% of its value. Id. Finally, Plaintiffs
 18 allege that on May 9, 2005, Cray publicly revealed that it failed to include an auditor’s
 19 opinion on management’s assessment of internal control over financial reporting, and Cray
 20 reported revenue results that were adversely impacted by faulty internal controls and
 21 practices causing Cray’s stock to drop another 35.6% by May 12, 2005. Id. ¶ 6.

22 Cray has a nine member Board of Directors. The Individual Defendants serving on
 23 the Board of Directors include Rottolk, Smith, Kennedy, Kiely, Regis, Narodick, Richards,
 24 Lederman, and Jones. Plaintiffs bring claims against each member of Cray’s Board for
 25 conduct during the Relevant Period. VADC ¶ 1. Plaintiffs also bring claims against Ungaro,
 26

1 Kiefer, Poteracki, and Johnson in their capacity as officers of Cray. VADC ¶¶ 16-19. Facts
2 relevant to the Individual Defendants are as follows:

3 Rottolk

4 Rottolk is the Chairman and CEO of Cray and has been a member of the Board of
5 Directors since Cray was founded in 1987. Rottolk also served as Cray's President from
6 March 2002 until March 7, 2005. Plaintiffs allege that Rottolk knew of Cray's adverse non-
7 public information from internal documents and conversations with others and participated in
8 the issuance of false or misleading statements. During the Relevant Period, Rottolk sold
9 79,980 shares of Cray stock for proceeds of \$960,710. Id. ¶¶ 14, 119(a).

10 Smith

11 Smith is a member of the Board of Directors and an employee of Cray. Id. ¶¶ 14,
12 119(d). Plaintiffs allege that Smith knew of Cray's adverse non-public information from
13 internal documents and conversations with others and participated in the issuance of false or
14 misleading statements. During the Relevant Period, Smith sold 49,548 shares of Cray stock
15 for proceeds of \$539,052. Id. ¶ 15.

16 Kennedy

17 Kennedy is a member of Cray's Board of Directors. Plaintiffs allege that Kennedy
18 knew of Cray's adverse non-public information from internal documents and conversations
19 with others and participated in the issuance of false or misleading statements. During the
20 Relevant Period, Kennedy sold 900 shares of Cray stock for proceeds of \$10,404. Id. ¶ 20.

21 Kiely

22 Kiely is a member of Cray's Board of Directors. Plaintiffs allege that Kiely knew of
23 Cray's adverse non-public information from internal documents and conversations with
24 others and participated in the issuance of false or misleading statements. Id. ¶ 21.

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1 Regis

2 Regis is a member of Cray's Board of Directors. Plaintiffs allege that Regis knew of
3 Cray's adverse non-public information from internal documents and conversations with
4 others and participated in the issuance of false or misleading statements. During the
5 Relevant Period, Regis sold 31,999 shares of Cray stock for proceeds of \$212,185. Id. ¶¶ 22,
6 115.

7 Narodick

8 Narodick is a member of Cray's Board of Directors. Plaintiffs allege that Narodick
9 knew of Cray's adverse non-public information from internal documents and conversations
10 with others and participated in the issuance of false or misleading statements. Id. ¶ 23.

11 Richards

12 Richards is a member of Cray's Board of Directors. Plaintiffs allege that Richards
13 knew of Cray's adverse non-public information from internal documents and conversations
14 with others and participated in the issuance of false or misleading statements. Id. ¶ 24.

15 Lederman

16 Lederman is a member of Cray's Board of Directors. Plaintiffs allege that Lederman
17 knew of Cray's adverse non-public information from internal documents and conversations
18 with others and participated in the issuance of false or misleading statements. Id. ¶ 25.

19 Jones

20 Jones is a member of Cray's Board of Directors. Plaintiffs allege that Jones knew of
21 Cray's adverse non-public information from internal documents and conversations with
22 others and participated in the issuance of false or misleading statements. Id. ¶ 26.

23 Ungaro

24 Ungaro was President of Cray during the Relevant Period. Plaintiffs allege that
25 Ungaro knew of Cray's adverse non-public information from internal documents and
26

1 conversations with others and participated in the issuance of false or misleading statements.

2 Id. ¶ 16.

3 Kiefer

4 Kiefer was Sr. Vice President of Cray at times during the Relevant Period. Plaintiffs
 5 allege that Kiefer knew of Cray's adverse non-public information from internal documents
 6 and conversations with others and participated in the issuance of false or misleading
 7 statements. Id. ¶ 17.

8 Poteracki

9 Poteracki was Sr. Vice President of Finance and Chief Financial Officer of Cray at
 10 times during the Relevant Period. Plaintiffs allege that Poteracki knew of Cray's adverse
 11 non-public information from internal documents and conversations with others and
 12 participated in the issuance of false or misleading statements. Id. ¶ 18.

13 Johnson

14 Johnson was General Counsel, Secretary, and CFO of Cray at times during the
 15 Relevant Period. Plaintiffs allege that Johnson knew of Cray's adverse non-public
 16 information from internal documents and conversations with others and participated in the
 17 issuance of false or misleading statements. Id. ¶ 19.

18 **DISCUSSION**

19 **I. Cray's Motion to Dismiss for Failure to Comply with the Demand Requirement**

20 **A. Legal Standards**

21 **1. Motion to Dismiss**

22 As with all motions to dismiss, allegations of material fact are taken as true and
 23 construed in the light most favorable to the nonmoving party. Smith v. Jackson, 84 F.3d
 24 1213, 1217 (9th Cir. 1996). However, conclusory allegations of law and unwarranted
 25 inferences are insufficient to defeat a motion to dismiss. Associated Gen. Contractors v.
 26 Metro. Water Dist. of So. Cal., 159 F.3d 1178, 1181 (9th Cir. 1998).

2. Governing Law for Shareholder Demand Requirement

Shareholder derivative actions must comply with FED. R. CIV. P. 23.1, which states in relevant part as follows: “The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority . . . and the reasons for the plaintiff’s failure to obtain the action or for not making the effort.” Rule 23.1 is related to the substantive requirement that plaintiffs in shareholder derivative suits must first demand that the corporation take the action that the plaintiffs seek to enforce through the suit. See Kamen v. Kemper Fin. Servs., 500 U.S. 90, 96 (1991) (Rule 23.1 “clearly contemplates both the demand requirement and the possibility that demand may be excused, [but] it does not create a demand requirement of any particular dimension.”).

12 Because the substantive demand requirement is established by state law, courts must
13 apply the law of the forum state—in this case, Washington State. See Erie R.R. Co. v.
14 Thompkins, 304 U.S. 64, 78 (1938). Washington State sets forth its own procedural demand
15 requirement for shareholder derivative actions in RCW 23B.07.400(2), which provides as
16 follows:

17 A complaint in a proceeding brought in the right of a corporation must be
18 verified and *allege with particularity the demand made, if any, to obtain action*
19 *by the board of directors and either that the demand was refused or ignored or*
20 *why a demand was not made.* Whether or not a demand for action was made, if
the corporation commences an investigation of the charges made in the demand
or complaint, the court may stay any proceeding until the investigation is
completed.

21 | (Emphasis added).

22 The parties in this case agree that Washington State courts have not interpreted or
23 applied this *procedural* demand requirement, nor have they specifically adopted an
24 underlying *substantive* demand requirement. As a result, both parties rely heavily on case
25 law from other jurisdictions, including the relatively well-developed body of law from

1 Delaware.³ The “substantive” demand requirement for Delaware is found in Delaware’s
 2 common law. “[T]he right of a stockholder to prosecute a derivative suit is limited to
 3 situations where the stockholder has demanded that the directors pursue the corporate claim
 4 and they have wrongfully refused to do so or where demand is excused because the directors
 5 are incapable of making an impartial decision regarding such litigation.” Rales v. Blasband,
 6 634 A.2d 927, 932 (Del. 1993) (noting the connection between this substantive requirement
 7 and the procedural requirement in Chancery Court Rule 23.1). The underlying purpose of
 8 this requirement is based on the fundamental principle that the “directors of a corporation
 9 and not its shareholders manage the business and affairs of the corporation” and the
 10 “decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is
 11 a decision concerning the management of the corporation.” Levine v. Smith, 591 A.2d 194,
 12 200 (Del. 1991), overruled on other grounds by Brehm v. Eisner, 746 A.2d 244, 253 n.13
 13 (Del. 2000).

14 Although relying heavily on Delaware law in their analysis, Plaintiffs suggest that the
 15 Court should not necessarily rely on such law but instead look to the plain language of RCW
 16 23B.07.400(2) and a two-page unpublished case from the Middle District of Tennessee
 17 discussing Tennessee’s procedural demand requirement statute, which is identical to the
 18 Washington State statute. See In re Direct General Corp. Sec. Litig., 2005 WL 1895638
 19 (M.D. Tenn. August 3, 2005). The Direct General Court’s analysis of the demand
 20 requirement was extremely limited, finding “that the allegations of the Verified Complaint
 21 are sufficient to excuse the demand otherwise required under Tennessee law” and that the

22
 23 ³ Delaware has adopted a procedural demand requirement, which is found in Delaware
 24 Chancery Court Rule 23.1, as follows:
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The complaint shall also allege with particularity the efforts, if any, made by
 the plaintiff to obtain the action the plaintiff desires from the directors or
 comparable authority and the reasons for the plaintiff’s failure to obtain the
 action or for not making the effort.

1 plaintiffs had “shown that the decision-makers’ interests and independence herein are
 2 sufficiently compromised by the actual allegations against them to excuse demand.” Id. at
 3 *1. The single Tennessee state law case relied upon by Direct General cites extensively to
 4 Delaware demand requirement and business judgment rule cases. See Lewis v. Boyd, 838
 5 S.W.2d 215, 222 (Tenn. App. 1992), (citing Aronson v. Lewis, 473 A.2d 805, 814 (Del.
 6 1984) and Levine, 591 A.2d at 212, regarding interestedness and independence). Thus,
 7 Direct General does not provide support for Plaintiffs’ contention that Washington State
 8 courts would deviate from the long-held corporate law standards of Delaware, nor does it
 9 provide any analysis that is useful in disposing of this motion to dismiss.

10 Rather than simply rely on Direct General as Plaintiffs suggest, this Court must
 11 attempt to “predict how the highest court of the state would decide the case if presented with
 12 the case today.” See Boland v. Engle, 113 F.3d 706, 710 (7th Cir. 1997). The Boland Court
 13 noted that this analysis may involve the consideration of relevant authority of other
 14 jurisdictions that have addressed the issue. Id. at 711-12 (noting that “Delaware corporate
 15 law is undoubtedly persuasive authority” but concluding that it is not necessarily dispositive).
 16 Ultimately, the Boland Court found the trend towards narrowing the exceptions to the
 17 demand requirement persuasive and held that Boland’s failure to make a demand was not
 18 excused. Id. at 713-14. In this Case, RCW 23B.07.400(2) strongly implies the existence of a
 19 substantive demand requirement in Washington State as does the underlying policy rational
 20 (i.e., business decisions are within the province of the Board of Directors and a shareholder
 21 demand is a business decision). Accordingly, the Court concludes that the Washington State
 22 Supreme Court would likely adopt the substantive demand requirement and apply a similar,
 23 if not the same, exception for futility as that employed in Delaware.

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1 **B. Shareholder Demand Requirement and the Futility Exception**

2 As described by the Supreme Court of Delaware, “the right of a stockholder to
 3 prosecute a derivative suit is limited to situations where the stockholder has demanded that
 4 the directors pursue the corporate claim and they have wrongfully refused to do so or where
 5 demand is excused because the directors are incapable of making an impartial decision
 6 regarding such litigation.” Rales v. Blasband, 634 A.2d at 932. Plaintiffs acknowledge that
 7 no demand was submitted to Cray’s Board of Directors in this case. VADC ¶ 119.
 8 Accordingly, dismissal is required unless Plaintiffs’ failure to comply with the demand
 9 requirement was excused under the so-called “futility” exception. See Rales, 634 A.2d at
 10 933-34.

11 Where, as in this case, the plaintiffs in a derivative suit do not challenge any specific
 12 decision of the board, courts must “examine whether the board that would be addressing the
 13 demand can impartially consider its merits without being influenced by improper
 14 considerations.” Id. at 934.⁴ Courts must look to the complaint and determine “whether or
 15 not the *particularized factual allegations* of a derivative stockholder complaint create a
 16 *reasonable doubt* that, as of the time the complaint is filed, the board of directors could have
 17 properly exercised its *independent and disinterested* business judgment in responding to a
 18 demand.” Id. (emphasis added). As one court described it, “the entire review is factual in
 19 nature.” In re Cedant Corp. Derivative Litig., 189 F.R.D. 117, 128 (D. N.J. 1999) (citing
 20 Aronson, 473 A.2d at 814). The inquiry requires courts to look to the totality of the
 21 circumstances in assessing whether a complaint creates a “reasonable doubt” concerning the
 22 board’s independence or disinterestedness:

23
 24 _____
 25 ⁴In cases where the plaintiff challenges a specific transaction, the demand requirement may
 26 be excused where the plaintiff can show that the transaction was not a product of a valid
 exercise of the defendants’ business judgment. See Aronson, 473 A.2d at 814. Here,
 Plaintiffs do not suggest that this prong of Aronson is applicable.

1 Terms like reasonable doubt, for example, help guide judgment but, are not
 2 scientific. In making the required judgment no single factor—such as receipt
 3 of directorial compensation; family or social relationships; approval of the
 4 transaction attacked; or other relationships with the corporation (e.g., attorney
 5 or banker)—may itself be dispositive in any particular case. Rather the
 6 question is whether the accumulation of all factors creates the reasonable doubt
 7 to which Aronson refers.

8 Harris v. Carter, 582 A.2d 222, 229 (Del. Ch. Ct. 1990). “[T]he concept of reasonable doubt
 9 is akin to the concept that the stockholder has a ‘reasonable belief’ that the board lacks
 10 independence.” Grimes v. Donald, 673 A.2d 1207, 1217 n.17 (Del. 1996), overruled on
 11 other grounds by Brehm v. Eisner, 746 A.2d 244, 253 n.13 (Del. 2000).

12 Based on these standards, Plaintiffs’ failure to make a demand is excused for futility
 13 only if a majority (five) of the members of Cray’s Board of Directors, as constituted at the
 14 time of filing the VADC, were either “interested” or “lacked independence.” Although the
 15 Plaintiffs allege 16 separate reasons why a majority of the members of Cray’s Board were
 16 either interested or lacked independence (meaning a demand on Cray would have been a
 17 “futile, wasteful and useless act”), Plaintiffs discuss only four of these allegations in their
 18 opposition to Defendants’ demand requirement motion. See VADC ¶ 119(a), (c)-(e); Pls.’
 19 Opp., at 11-15. The Court limits its analysis of Plaintiffs’ futility allegations to only those
 20 that Plaintiffs support with argument.⁵

21 ⁵ Even a cursory review of the remaining allegations reveals that they are generic and
 22 conclusory under the “interested” and “independent” standards discussed below. See ¶¶
 23 119(b) (allegation that current directors are not independent of compensation committee), (f)
 24 (allegation that directors breached fiduciary duties), (g) (generic allegation of inter-related
 25 familiar, business, professional and personal relationships), (h) (generic allegation of
 26 knowledge of and/or benefits from wrongdoing), (i) (generic allegation of participation in
 and/or approval of wrongdoing), (j) (generic allegation that directors would be forced to sue
 themselves), (k) (repeated allegation of fiduciary duty violations), (l) (generic allegation that
 Board authorized and/or permitted false statements), (m) (allegation that suit by current
 directors would “likely expose” directors and officers to further violations of securities laws),
 (n) (allegation that Cray will be exposed to further losses), (o) (allegation that allowing
 derivative suit to move forward would expose directors to liability in the class action suits),
 (p) (allegation that directors may face uninsured liability).

1. Interested Board Members

2 The Rales Court succinctly described the “interest” considerations as follows: “A
3 director is considered interested where he or she will receive a personal financial benefit that
4 is not equally shared by the stockholders. Directorial interest also exists where a corporate
5 decision will have a materially detrimental impact on a director, but not on the corporation
6 and the stockholders.” 634 A.2d at 936. However, “the mere threat of personal liability for
7 approving a questioned transaction, standing alone, is insufficient to challenge . . . [the]
8 disinterestedness of directors.” In re Sagent Tech., Inc., Derivative Litig., 278 F. Supp. 2d
9 1079, 1089 (N.D. Cal. 2003) (quoting Aronson). In other words, “[a] plaintiff may not
10 bootstrap allegations of futility by pleading merely that the directors participated in the
11 challenged transaction or that they would be reluctant to sue themselves.” Id. (citations
12 omitted).

13 In Sagent, plaintiffs alleged that a demand was futile because three of the six board
14 members were either interested or lacked independence. 278 F. Supp. 2d 1079, 1088 (N.D.
15 Cal. 2003). One member, Zicker, was allegedly interested because he sold common stock for
16 more than \$1.3 million in proceeds. Id. 1088-89. Plaintiffs alleged that Zicker did so while
17 “in possession of material, adverse nonpublic information.” Id. The Sagent Court concluded
18 that this generic allegation was insufficient to demonstrate “a substantial likelihood” that
19 Zicker would be liable for insider trading. Id. at 1089. Additionally, the plaintiffs in Sagent
20 alleged that the members of Sagent’s Audit Committee “failed to establish and maintain
21 adequate internal accounting controls and to ensure that the company’s financial statements
22 were based on accurate information.” Id. at 1084-85. However, they apparently did not
23 allege that this failure rendered the audit committee interested.

24 At the time Plaintiffs filed this derivative suit, the members of Cray's Board of
25 Directors included Rottolk, Smith, Jones, Kennedy, Kiely, Lederman, Narodick, Regis, and
26 Richards. Plaintiffs' opposition brief relies on only two allegations to demonstrate

1 interestedness: (1) Regis, Richards, Narodick, and Lederman are interested because they are
2 members of Cray's Audit Committee ("Audit Committee Directors") (VADC ¶ 119(e)); and
3 (2) Rottolk, Smith, Kennedy, and Regis are interested because they sold Cray stock during
4 the Relevant Period ("Selling Directors") (VADC ¶ 119(a)).⁶ Pls.' Opp., docket no. 22, at
5 12-15. Because Plaintiffs must demonstrate that a total of five members were interested or
6 lacked independence, the demand requirement is only excused if they establish that one
7 group or the other is interested *and* there is at least one additional director who was either
8 interested or who lacked independence (for a total of five). The Court turns now to an
9 examination of the allegedly interested directors.

a. Audit Committee Directors

11 According to Cray's 2005 Proxy, Cray's Audit Committee "assists the Board of
12 Directors in fulfilling its responsibility for oversight of" the following: "[1] the quality and
13 integrity of [Cray's] accounting and financial reporting processes and the audits of [Cray's]
14 financial statements; [2] the qualifications and independence of the public auditing firm
15 engaged to issue an audit report on [Cray's] financial statements; [3] the performance of
16 [Cray's] systems of internal controls, disclosure controls and internal audit functions, and [4]
17 [Cray's] procedures for legal and regulatory compliance, risk assessment and business
18 conduct standards." VADC ¶ 29(A). Plaintiffs allege that these duties required the Audit
19 Committee to review and discuss financial reporting and accounting policies with
20 management and auditors, review and approve SEC filings in advance, oversee
21 disagreements between management and auditors, and recommend whether financial
22 statements should be included in the 10-K Reports. *Id.*

²⁶ Plaintiffs allege that Johnson and Poteracki sold stock during the Relevant Period. VADC ¶ 115. However, those Defendants were not directors when this action commenced.

1 In their opposition brief, Plaintiffs argue that three cases support their contention that
 2 Cray's Audit Committee Directors are interested under the Rales test.⁷ Cedant, 189 F.R.D.
 3 117; In re Lernout & Hauspie Sec. Litig., 286 B.R. 33 (D. Mass. 2002); In re Oxford Health
 4 Plans, Inc. Sec. Litig., 192 F.R.D. 111 (S.D.N.Y. 2000). First, Plaintiffs state that the Cedant
 5 Court "found demand to be futile in part because it was the Audit Committee's responsibility
 6 to catch and correct the accounting irregularities." Resp. Br. at 13. This interpretation of
 7 Cedant is mistaken. Plaintiffs cite the "Background" section of the Cedant Court's Order,
 8 which noted that the Audit Committee was "specifically informed" that its income was
 9 overstated prior to the date Cedant publicly announced that information and, while in
 10 possession of this information, several members of the Audit Committee sold a total of 1.8
 11 million shares of Cedant stock in the months before the announcement. 189 F.R.D. at 125;
 12 Pls.' Opp., at 13 n.14. However, the "Demand" section of the Cedant Court's analysis is
 13 devoid of any suggestion that the Audit Committee members were interested merely because
 14 they were on the Audit Committee. Id. at 128-29 (citing instead the benefits directors
 15 received from transactions, the sale of millions of shares of stock by directors while in
 16 possession of adverse information, and the "significant personal liability" directors faced
 17 from a pending class action suit). In this case, the VADC alleges only that the Audit
 18 Committee "recommended that the Board include the improper financial statements and
 19 publish the improper and misleading press releases throughout the Relevant Period" and that
 20 such actions breached the Audit Committee's fiduciary duties. VADC ¶ 119(e). Cedant
 21 provides no helpful analysis as to these demand futility allegations.

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24 ⁷ At argument, Plaintiffs' counsel stated that they also relied on In re Caremark Int'l, Inc.,
 25 Derivative Litig., 698 A.2d 959 (1996), to support the argument that the Audit Committee
 26 is "interested." Caremark was discussed in Plaintiffs' brief with regard to the exculpatory
 provisions in Cray's bylaws and was not discussed in the "Audit Committee" section of
 Plaintiffs' brief. See Pls.' Opp., at 12-13, 15-16. In any event, Caremark is also discussed
 below.

1 Second, Lernout is inapposite as it provides no analysis of the demand requirement
 2 and addressed only a motion to dismiss for failure to allege facts sufficient to state claims for
 3 breach of fiduciary duties. Lernout did not apply the “interestedness” standard established in
 4 Rales and, in fact, involved class action claims under Section 10(b) of the Securities
 5 Exchange Act rather than a derivative action. 286 B.R. at 37-38.

6 Finally, the Oxford Court offered a lengthy recitation of the demand futility standards
 7 and proceeded to conclude demand was excused without any discussion of which specific
 8 directors were interested or lacked independence. 192 F.R.D. at 115-18 (concluding that it
 9 “appears unnecessary . . . to address the issue of the independence or disinterestedness of the
 10 Directors individually”). Instead, the Oxford Court looked generally to the insider trading
 11 allegations. Id. at 117-18. Contrary to Plaintiffs’ suggestion, Oxford is devoid of any
 12 discussion regarding the interestedness of the Audit Committee but merely states generally,
 13 and without citation, that knowledge of another’s improper insider trading is enough to
 14 demonstrate interestedness. Oxford does not support Plaintiffs’ contention that the Audit
 15 Committee Directors are interested by virtue of their place on the Audit Committee.

16 Plaintiffs’ additional reliance on Caremark is also misplaced. Caremark did not
 17 address demand futility, but only stated the liability standard for certain breaches of the duty
 18 of care. 698 A.2d at 970 (director’s obligation includes a duty to attempt in *good faith* to
 19 assure that a corporate information and reporting system exists and failure to do so may, in
 20 theory, render a director liable for losses caused by non-compliance). The Caremark Court
 21 held that “only a sustained or systematic failure of the board to exercise oversight—such as
 22 an utter failure to attempt to assure a reasonable information and reporting system
 23 exists—will establish the lack of good faith that is a necessary condition to liability.” Id. at
 24 971. The Court described such a claim as “possibly the most difficult theory in corporation
 25 law upon which a plaintiff might hope to win a judgment” and noted that, even if the harm to
 26 the corporation was caused by a violation of the criminal law, it is not necessarily enough to

1 create a breach of fiduciary duty. Id. at 967, 972. To demonstrate that the Audit Committee
 2 is interested as the result of a possible Caremark claim, Plaintiffs must provide
 3 “particularized factual allegations” that the members face a “materially detrimental impact”
 4 if the claim were to proceed. See Rales, 634 A.2d at 934, 936. The “mere threat” of liability
 5 under a Caremark claim is not enough. Sagent, 278 F. Supp. 2d at 1089. Although the
 6 VADC alleges broadly that Cray was “virtually devoid of internal controls, processes and
 7 procedures in every area of the finance and accounting departments,” Plaintiffs have not
 8 provided “particularized factual allegations” suggesting that (assuming this characterization
 9 is true for purposes of the motion) it was the result of a “sustained or systematic failure” by
 10 the Audit Committee. See VADC 119(e).

11 In sum, Plaintiffs’ “demand futility” cases do not stand for the proposition that a
 12 committee assigned the general oversight responsibility of the activities underlying a
 13 derivative complaint (e.g., establishing accounting controls and guarding against
 14 irregularities) is *per se* “interested.” Nor have Plaintiffs adequately alleged facts that suggest
 15 a substantial likelihood of liability under a Caremark duty of care claim. Plaintiffs must
 16 allege facts that state “with particularity” the manner in which a given director is interested.
 17 See RCW 23B.07.400(2). The mere threat of personal liability alone is insufficient. Sagent,
 18 278 F. Supp. 2d at 1089. Plaintiffs’ generic allegation regarding the Audit Committee
 19 Directors fails to demonstrate that those Directors are interested.

20 **b. Insider Sales**

21 The VADC alleges that the Selling Directors include Rottolk, Smith, Regis, and
 22 Kennedy. VADC ¶ 119(a). In its motion to dismiss, Cray contends that (1) Kennedy was an
 23 outside director presumed to have no information about day-to-day company affairs, and (2)
 24 Kennedy’s one sale occurred in August 2003, which, while in the Relevant Period, was
 25 before the FY 2004 issues Plaintiffs rely upon. In response, Plaintiffs apparently abandon
 26 the allegation that Kennedy is interested as a result of his single stock sale during the

1 Relevant Period. See Pls.' Opp., at 14 (no discussion of Kennedy). Accordingly, the Selling
 2 Directors, for purposes of this analysis, include only Rottolk, Smith, and Regis.

3 The VADC alleges that the Selling Directors were privy to the adverse, non-public
 4 information regarding Cray's accounting systems when they sold shares of Cray stock during
 5 the Relevant Period. VADC ¶ 119(a). The Selling Directors engaged in at least nine
 6 separate sales during the Relevant Period. Id. ¶ 115 (Sales Schedule).⁸

7 In support of their argument that the Selling Directors were interested, Plaintiffs rely
 8 on a single unpublished opinion from the Delaware Chancery Court. See Zimmerman v.
 9 Braddock (Zimmerman II), 2005 Del. Ch. Lexis 135 (Del. Ch. 2005). In Zimmerman II,
 10 nominal defendant Priceline licensed its technology to a separate privately-held company,
 11 WebHouse, in return for royalties. Id. at *8. In the derivative action, the plaintiff alleged
 12 that Priceline's management knew that WebHouse was losing \$5 million a week and having
 13 technical problems causing the website to crash. Id. at *9. In spite of these problems,
 14 Priceline's management continued to publicly tout the prospects of the technology and its
 15 relationship with WebHouse. Id. at *10. During this period, three of Priceline's directors
 16 sold approximately \$248 million worth of Priceline's stock in just 45 days. Id. at *11 n.21.
 17 In determining whether these three directors were interested for purposes of the demand
 18 futility analysis, the Delaware Chancery Court reasoned as follows:

19 A reasonable inference from the Plaintiff's allegations is that the Selling Defendants had
 20 knowledge – directly and by imputation – of Priceline and WebHouse's problems. In
 21 addition, it is a reasonable inference that the public was not aware of Priceline's true
 22 predicament because its problems – even if they had been partially disclosed – were likely
 23 overshadowed by the public hyperbole of Priceline's executives.

24 . . .

25 When the sheer size of the trades (collectively, approximately \$248 million dollars) is
 26 combined with the Plaintiff's well-pled allegations of insider trading culpability, the Selling
 27 Defendants, for motion to dismiss purposes, can be viewed as facing substantial personal

28 ⁸ Plaintiffs' schedule of stock sales omits Individual Defendant Smith. Id. at ¶ 115. Plaintiffs
 29 allege that Smith sold 49,548 shares for a total of \$539,052 but do not provide the number of
 30 trades or dates of each trade. Id. at ¶ 119(a)(ii).

1 liability even though the materiality of the trades (or the consequences of an action
 2 challenging them) to the Selling Defendants has not been specifically pled.

2 . . .

3 The question with regard to demand futility is whether the trading directors could impartially
 4 consider a shareholder's demand upon the corporation to pursue a claim against them based
 5 on their trades. In light of the allegations in the Second Amended Complaint and the value
 6 of the Selling Defendants' trades, it is a reasonable inference that the Selling Defendants
 7 would be personally and significantly concerned about, and opposed to, any such demand
 8 and, thus, interested in whether the Priceline Board would pursue a claim based on their
 9 trades.

10 Id. at *32-35. Also, in Zimmerman I, 2002 Del. Ch. LEXIS 145, *8 n.64, the selling
 11 defendants did not even contest the fact that they were interested as a result of the \$248
 12 million in stock sales, which was likely a consideration for the Zimmerman II Court. Id. at
 13 *29.

14 In this case, Plaintiffs contend that the Selling Directors were privy to inside
 15 information concerning "the complete absence of the Company's internal controls and the
 16 difficulties Cray was encountering producing and qualifying its new products" as a result of
 17 their positions as CEO (Rottolk), employee (Smith), and Chairman of Cray's Audit
 18 Committee (Regis). Pls.' Opp., at 14. Plaintiffs cite no other allegations in the VADC that
 19 state what specific information Rottolk, Smith, and Regis knew, or when they would have
 20 become aware, of such information in relation to each stock sale.

21 Cray argues that Plaintiffs' insider trading claims do not demonstrate "interestedness"
 22 because (1) Regis was (like Kennedy) an outside director, (2) Plaintiffs' allegations are
 23 conclusory and insufficient under the case law, and (3) the sales by Rottolk and Smith were
 24 made pursuant to Rule 10b5-1 plans, which provides an affirmative defense. First, Cray
 25 notes that Regis was an outside director during the entire Relevant Period and that the law
 26 presumes that outside directors are not responsible for false or misleading information under
 the "group published information" rule. See In re GlenFed, Inc., Sec. Litig., 60 F.3d 591,
 593 (9th Cir. 1995). In GlenFed, the Ninth Circuit held that "[m]erely because the complaint
 identifies a corporation's outside directors, various committee assignments, and generic

1 responsibilities for every committee” does not mean such outside directors are responsible
 2 for information published on behalf of the group. Id. Plaintiffs do not directly respond to
 3 this argument and appear to rely only on the fact that Regis was the Chairman of Cray’s
 4 Audit Committee.

5 Second, Cray contends that at least two cases applying Delaware law, Sagent and
 6 Guttman v. Huang, 823 A.2d 492 (Del. Ch. Ct. 2003), have held that similar insider trading
 7 claims were insufficient to demonstrate interestedness. In Sagent, the plaintiffs alleged that
 8 Zicker “sold 80,000 shares of Sagent common stock while in the possession of material,
 9 adverse, non-public information,” reaping a \$1.3 million profit. 278 F. Supp. 2d at 1088.
 10 The Sagent Court concluded that the director was not interested because the complaint
 11 contained no allegation that the director was in possession of any particular material adverse
 12 information when he sold Sagent stock. Id. at 1089. Similarly, in Guttman, the complaint
 13 alleged that “each of the defendants who sold during the contested period was in possession
 14 of material, non-public information and traded to his personal advantage using that
 15 information.” 823 A.2d at 496. The complaint also stated that “[e]ach of the defendants was
 16 in a position to know of the improper accounting practices engaged in by NVIDIA” and
 17 “[e]ach of the defendants engaged in trades shortly after NVIDIA released a financial
 18 statement that was later restated.” Id. at 496-97. The Guttman Court concluded that these
 19 allegations were “wholly conclusory” and did not include “well-pled, particularized
 20 allegations of fact detailing the precise roles that these directors played at the company, the
 21 information that would have come to their attention in those roles, and any indication as to
 22 why they would have perceived the accounting irregularities.” Id. at 503.

23 Finally, Cray contends that the trades by Rottolk and Smith are subject to an
 24 affirmative defense because those trades were effectuated under 10b5-1 plans that
 25 automatically dictated the amount and timing of the sales. For example, Rottolk’s
 26 scheduled sales included 15,000 shares each in August, September, October, and November

1 2003, and January 2004. VADC ¶ 115. In response, Plaintiffs argue that a ruling on this
 2 affirmative defense would only be appropriate in a summary judgment motion after the case
 3 has been developed factually through discovery. Plaintiffs are correct that the Court may not
 4 consider affirmative defenses at this juncture, particularly where Defendants have not yet
 5 filed an Answer to the VADC.

6 While the interestedness determination for insider sales is not entirely clear, the cases
 7 support Cray's contention that the Plaintiffs' allegations are insufficient. Both Sagent and
 8 Gutman analyzed nearly-identical allegations regarding insider sales and found those
 9 allegations conclusory and insufficient to demonstrate interestedness. In contrast, the more
 10 recent unpublished opinion in Zimmerman II held that similar allegations were sufficient to
 11 demonstrate interestedness. However, the Zimmerman II Court gave significant weight to
 12 the "sheer size of the trades (collectively, approximately \$248 million dollars)," all of which
 13 occurred in 45 days. 2005 Del. Ch. Lexis 135 at *11, 33-35. That volume of trading is
 14 absent from this case, where the Selling Defendants sold a total of 161,527 shares of Cray
 15 stock for approximately \$1.71 million in proceeds over a 16-month period. See VADC ¶¶
 16 115, 119(a) (sales occurred from August 2003 to December 2004). As a result, the weight of
 17 authority analogous to this case supports Defendants' argument and the Court concludes that
 18 the Selling Directors were not interested.⁹

19 **2. Independence of Board Members**

20 The Rales Court described the "independence" considerations as follows:

21 [I]ndependence means that a director's decision is based on the corporate
 22 merits of the subject before the board rather than extraneous considerations or
 23 influences. To establish a lack of independence, [plaintiff] must show that the
 directors are beholden to the [interested directors] or so under their influence
 that their discretion would be sterilized.

24 _____

25 ⁹ The Court also notes that, for the reasons discussed in Part II.B below, common law insider
 26 trading claims are not available in Washington State. Because the Selling Directors are not
 subject to personal liability for derivative insider trading claims, the sufficiency of the
 "interestedness" futility allegation is further diminished.

1 634 A.2d at 936 (quotations and citations omitted). In Texlon Corp. v. Myerson, the
 2 Delaware Supreme Court elaborated on this standard, stating as follows:

3 A controlled director is one who is dominated by another party, whether
 4 through close personal or familial relationship or through force of will. A
 5 director may also be deemed “controlled” if he or she is beholden to the
 6 allegedly controlling entity, as when the entity has the direct or indirect
 7 unilateral power to decide whether the director continues to receive a benefit
 upon which the director is so dependent or is of such subjective material
 importance that its threatened loss might create a reason to question whether
 the director is able to consider the corporate merits of the challenged
 transaction objectively.

8 802 A.2d 257, 264 (Del. 2002).

9 In a single paragraph of argument, Plaintiffs contend that two members of Cray’s
 10 Board, Rottolk and Smith, are not independent. Pls.’ Opp., at 11-12 (arguing Rottolk and
 11 Smith are not independent because they rely on substantial income from Cray as employees).
 12 Plaintiffs are correct. In Rales, the Court found that two members of the board (Sherman, the
 13 CEO, and Ehrlich, the President of a related company) lacked independence from two
 14 controlling directors where they received large salaries from the companies and, therefore, it
 15 could be inferred that they were beholden. 634 A.2d at 937.¹⁰ Additionally, Defendants do
 16 not respond to Plaintiffs’ argument that Rottolk and Smith lack independence and, at
 17 argument, Defendants’ counsel all but conceded that the Delaware cases hold as such.
 18 Therefore, the Court presumes that the argument has merit and concludes that Rottolk and
 19 Smith are “interested” for purposes of this motion.

20 **3. Plaintiffs have not Established that Demand was Futile**

21 Under the demand futility analysis, Plaintiffs must demonstrate through the
 22 allegations contained in the VADC that a majority (five) of the members of Cray’s Board of

24

¹⁰ But see Sagent, 278 F. Supp. 2d at 1089 (board members do not lack independence based
 25 solely on their positions and the monetary compensation they received in connection with
 26 their duties as employee and consultant for the company). However, the Sagent Court relied
 only on a pre-Rales case from Delaware for this proposition and, therefore, does not provide
 a helpful analysis. See id. (citing Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988)).

1 Directors are either interested or lack independence. Rales, 634 A.2d at 933-34. Plaintiffs
 2 have failed to make such a showing. The relevant case law does not hold that a director is
 3 interested merely by virtue of sitting on an Audit Committee while the corporation faces
 4 accounting and audit irregularities. Similarly, the weight of authority suggests that Rottolk,
 5 Smith, and Regis are not interested as a result of having sold shares of Cray stock during the
 6 Relevant Period. Both Sagent and Guttman specifically held that insider sales such as those
 7 at issue here were insufficient, and the lone, unpublished case cited by Plaintiffs is
 8 distinguishable to the extent that the proceeds in this case (\$1.71 million) are vastly
 9 disproportionate to Zimmerman, where the Court noted the “sheer size of the trades” (\$248
 10 million). Finally, the only directors who lack independence are Rottolk and Smith.¹¹
 11 Accordingly, the Court GRANTS Defendants’ motion to dismiss for failure to comply with
 12 the pre-litigation demand requirement.

13 **II. Individual Defendants’ Motion to Dismiss¹²**

14 In addition to joining Cray’s motion to dismiss for failure to comply with the demand
 15 requirement, the Individual Defendants move separately to dismiss the VADC for failure to
 16 comply with the pleading requirements in Rule 9(b), and failure to state claims upon which
 17 relief can be granted under Rule 12(b)(6). First, the Individual Defendants contend that the
 18 VADC alleges a “unified course of fraudulent conduct,” requiring Plaintiffs to state those
 19 fraud allegations with particularity. Second, the Individual Defendants argue that Plaintiffs’
 20 two claims relating to insider trading may not be brought in a derivative action. See VADC
 21 ¶¶ 120-24 (Count I: Breach of Fiduciary Duty for Misappropriate Information), 145-47

22
 23 ¹¹ The Court notes that even if the Selling Directors were interested, Plaintiffs fail to
 24 demonstrate that a majority of Cray’s Board is impartial because Rottolk and Smith are in
 25 both groups.

26 ¹² The motion to dismiss for failure to adequately plead demand futility is also GRANTED as
 to the Individual Defendants, who incorporate that argument by reference into their motion to
 dismiss. The Court will also consider the Individual Defendants’ separate motion to dismiss.

1 (Count VI: Unjust Enrichment). Third, the Individual Defendants contend that Plaintiffs'
 2 claims for breach of fiduciary duties, abuse of control, gross mismanagement, and waste
 3 (Counts II, III, IV, and V, respectively) must be dismissed because Plaintiffs fail to allege
 4 any cognizable claim for damages. Finally, the Individual Defendants contend that
 5 Plaintiffs' claim for corporate waste must also be dismissed for failure to allege facts
 6 sufficient to state a claim.

7 **A. Failure to Plead Fraud Under Federal Rule of Civil Procedure 9(b)**

8 Under FED. R. CIV. P. 9(b), “[i]n all averments of fraud or mistake, the circumstances
 9 constituting fraud or mistake shall be stated with particularity.” In general, Rule 9(b)
 10 requires fraud allegations to include “the who, what, when, where, and how of the
 11 misconduct charged.” Vess v. CIBA-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir.
 12 2003) (quotations omitted). The Ninth Circuit has distinguished between cases in which
 13 fraud allegations form the entire basis for a claim and cases in which there is both fraudulent
 14 and non-fraudulent conduct underlying a claim:

15 In some cases, the plaintiff may allege a unified course of fraudulent conduct
 16 and rely entirely on that course of conduct as the basis of a claim. In that
 17 event, the claim is said to be “grounded in fraud” or to “sound in fraud,” and
 18 the pleading of that claim as a whole must satisfy the particularity requirement
 19 of Rule 9(b).

20 ...

21 In other cases, however, a plaintiff may choose not to allege a unified course of
 22 fraudulent conduct in support of a claim, but rather to allege some fraudulent
 23 and some non-fraudulent conduct. In such cases, only the allegations of fraud
 24 are subject to Rule 9(b)’s heightened pleading requirement.

25 Id. at 1103-04 (citations omitted).

26 Here, the parties’ dispute centers on whether any or all of Plaintiffs’ claims are
 27 “grounded in fraud” such that they are entirely subject to Rule 9(b) or whether the fraud
 28 allegations may be addressed separately. The Individual Defendants argue that each claim is
 29 grounded in fraud because Plaintiffs incorporate by reference allegations of
 30 misrepresentation and concealment. See VADC ¶¶ 3, 4, 7, 41-42 (alleging knowing

1 misrepresentations, concealment of facts, misleading of analysts, and conspiracy). The
 2 Individual Defendants contend that these allegations are conclusory and fail to allege what
 3 was false or misleading about the statements, which directors and officers knew they were
 4 misleading, and when they knew it.

5 In response, Plaintiffs first argue that a number of their claims do not rely on
 6 allegations of fraud. In particular, Plaintiffs refer to their claims for (1) breach of the
 7 fiduciary duties of good faith and due care, (2) gross mismanagement, and (3) waste. These
 8 claims are based in part upon allegations that the Individual Defendants failed to fulfill a duty
 9 to implement effective internal controls over Cray's financial reporting. See VADC ¶¶ 125-
 10 130 (breach of fiduciary duty of care and good faith), 136-140 (gross mismanagement), 141-
 11 144 (waste). This argument has merit. Plaintiffs allege that the Individual Defendants
 12 "abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently
 13 managing the assets and business of Cray" and failed "to conduct proper supervision." Id. ¶¶
 14 137, 142. These allegations and the claims they support do not rely on or involve fraud.
 15 Under the distinction described in Vess, the breach of duty of care, mismanagement, and
 16 waste claims are not subject to Rule 9(b) and do not fail in their entirety as the Individual
 17 Defendants contend.

18 Second, Plaintiffs argue that those claims dependant on averments of fraud may also
 19 stand because the VADC satisfies the "particularity" requirement of Rule 9(b). This
 20 argument is not well taken. In support of their position that they sufficiently alleged the
 21 "who, what, where, when, and how" of the fraud allegations, Plaintiffs simply cite to
 22 paragraphs 55, 63, 66-67, 75, 81, 93, 99, and 100 of the VADC, without further explanation.
 23 However, these allegations are largely conclusory and redundant. Paragraphs 55, 63, 66-67,
 24 75, and 81 simply offer repeated citations to Cray's 10Q quarterly public disclosures, which
 25 each state (with some minor variation) in relevant part as follows:

26 Based on the evaluation, our principal executive and financial officers each
 concluded that, as of the date of the evaluation, our disclosure controls and

1 procedures were effective in providing reasonable assurance that material
 2 information relating to Cray and our consolidated subsidiaries is made known
 3 to management, including during the period when we prepare our periodic SEC
 4 reports.

5 Id. at ¶ 55. The VADC alleges only that, in fact, Cray “did not have sufficient internal
 6 controls to ensure either that revenue was properly recognized or that financial information
 7 was accurately reported.” Id. at ¶ 56. Plaintiffs do not explain why or when Cray’s CEO and
 8 CFO stopped concluding that Cray’s procedures were effective, nor do they state how or
 9 when the other Individual Defendants would have learned of this information. Similarly,
 10 paragraphs 93, 99, and 100 merely cite Cray’s disclosure that it expected to, and ultimately
 11 did, identify material weaknesses in its internal controls and accounting procedures. The
 12 VADC fails to explain how these disclosures, which are apparently pled to demonstrate that
 13 the earlier statements were false, establish that the Individual Defendants knew the earlier
 14 statements were false when made.

15 Finally, Plaintiffs argue that much of the evidence related to the fraud allegations is in
 16 the hands of the Individual Defendants, essentially seeking to excuse the generality of the
 17 VADC until they can obtain such evidence through discovery. See U.S. Ex. Rel. Lee v.
SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001) (“Rule 9(b) may be relaxed
 18 to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is
 19 within a defendant’s exclusive possession.”), overruled on other ground by Hollinger v. Titan
Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990). However, the cases allowing for a
 20 relaxed application of Rule 9(b) continue to require significant particularity in the pleading.
 21 See, e.g., Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1440 (9th Cir. 1987) (fraud
 22 allegations are “very precise” and specify “the exact dollar amount of each alleged
 23 overstatement, and the manner in which such representations were false and misleading”);
 24 Fed. Sav. and Loan Ins. Corp. v. Musacchio, 695 F. Supp. 1053, 1058-59 (N.D. Cal. 1988)
 25 (“In virtually every instance in which fraud is alleged the plaintiffs have set forth the time,
 26 place and manner of the allegedly fraudulent acts.”). No such precision or specificity is

1 present in the VADC. Thus, the Court also GRANTS the Individual Defendants' motion to
 2 dismiss the fraud allegations for failure to comply with Rule 9(b) and dismisses those claims
 3 without prejudice.¹³

4 **B. Insider Trading Claims (Counts I and VI) Under Federal Rule of Civil
 5 Procedure 12(b)(6)**

6 A motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6) may be
 7 granted only where it appears beyond a reasonable doubt that the plaintiff can prove no set of
 8 facts that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
 9 Allegations of material fact are taken as true and construed in the light most favorable to the
 10 nonmoving party. Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996). However,
 11 conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion
 12 to dismiss. Associated Gen. Contractors v. Metro. Water Dist. of So. Cal., 159 F.3d 1178,
 13 1181 (9th Cir. 1998).

14 The Individual Defendants raise four arguments in support of their motion to dismiss
 15 the insider trading claims (Counts I and VI) for failure to state a claim: (1) not all of the
 16 Individual Defendants sold stock during the relevant period and those that did not should be
 17 dismissed as to the insider trading claims; (2) several of the Selling Defendants sold pursuant
 18 to 10b5-1 plans, which provides an affirmative defense; (3) several of the Selling Defendants
 19 *purchased* and continued to hold shares during the Relevant Period; and (4) there is no
 20 common law derivative cause of action for insider trading because Cray sustained no
 21 damages. Defs.' Mot. at 6-9.

22 The Individual Defendants' first three arguments are not well developed and are
 23 without merit in the context of a 12(b)(6) motion to dismiss. First, the VADC refers to the

24 ¹³ The claims based in fraud include Count I (breach of fiduciary duty of loyalty and good
 25 faith for insider selling), Count II (breach of fiduciary duty of loyalty and good faith for
 26 improperly misrepresenting Cray's financial statements), part of Count V (waste caused by
 27 improper public statements, financial results and prospectus), and Count VI (unjust
 28 enrichment for insider selling on the basis of misrepresented financial information).

1 “Insider Selling Defendants” in Count I and the “defendants” in Count VI. See VADC ¶¶
 2 120-124, 145-147. Plaintiffs specify which Individual Defendants sold Cray stock during the
 3 Relevant Period. Id. ¶ 115.¹⁴ Thus, under the minimal notice pleading requirement of Rule
 4 8(a), the VADC adequately identifies the Individual Defendants at issue in Counts I and VI.
 5 Second, the 10b5-1 argument is, as the Individual Defendants acknowledge, an affirmative
 6 defense. The Individual Defendants have filed no Answer to the VADC and, therefore,
 7 alleged no affirmative defenses. The Court will not dismiss the insider sales claims on the
 8 basis of a yet-to-be-pled affirmative defense, particularly where the Individual Defendants
 9 bear the burden of proof. See T. HAZEN, THE LAW OF SECURITIES REGULATION § 12.17 (5th
 10 ed. 2002) (noting that courts require the defendant to demonstrate that stock sales were made
 11 pursuant to a 10b5-1 plan). Third, the Individual Defendants do not support their argument
 12 that Smith, Johnson, Rottolk and Poteraki should be dismissed because they purchased and
 13 held additional shares during the Relevant Period. The Individual Defendants cite no
 14 authority for the proposition that a defendant’s purchase of stock during a period of allegedly
 15 unlawful insider sales entitles them to dismissal.

16 The more closely contested issue is whether a common law derivative claim for
 17 insider selling even exists. The Individual Defendants cite two cases holding that such
 18 claims are not available and a leading corporate law treatise stating that a majority of courts
 19 are in agreement. See Freeman v. Decio, 584 F.2d 186, 192-95 (7th Cir. 1978) (claim
 20 dismissed because (1) no damages to corporation and (2) defendants would be subject to
 21 double liability given availability of Rule 10b(5) claims); Frankel v. Slotkin, 795 F. Supp. 76,
 22 79-80 (E.D.N.Y. 1992) (claim dismissed for lack of actual damage to the corporation); 3A
 23 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §
 24 1174 (perm. ed. 2002) (“[M]ost courts considering the issue have rejected a common law

25
 26 ¹⁴ Plaintiffs have, however, mistakenly omitted Defendant Smith from this schedule, but they
 name Smith as a Selling Defendant in paragraphs 15 and 119(a).

1 corporate cause of action against directors and officers for insider trading"). The Individual
 2 Defendants also note that Washington State generally requires a showing of damages for
 3 breach of fiduciary duty and unjust enrichment claims. See Interlake Porsche Audi, Inc. v.
 4 Bucholz, 45 Wn. App. 502, 509 (1986) (showing of proximate causation of loss sustained by
 5 corporation required); Bailie Communications, Ltd. v. Trend Bus. Sys., Inc., 61 Wn. App.
 6 151, 159 (1991) (unjust enrichment claim requires showing defendants enriched themselves
 7 at the expense of the corporation).

8 In response, Plaintiffs rely heavily on Brophy v. Cities Services Company, 70 A.2d 5,
 9 8 (Del. Ch. 1949), which held that “[i]n equity, when the breach of a confidential relation by
 10 an employee is relied on and an accounting for any resulting profits is sought, loss to the
 11 corporation need not be charged in the complaint.” See also Diamond v. Oreamuno, 301
 12 N.Y.S.2d 78, 83 (1969) (relying on Brophy in holding that there may be an insider trading
 13 claim); Walton v. Morgan Stanley & Co., Inc., 623 F.2d 796, 798 (2d Cir. 1980) (stating that
 14 Delaware courts have “consistently followed” Brophy’s holding that a breach of fiduciary
 15 duty is actionable absent an injury without analyzing Brophy’s continued viability after the
 16 implementation of 10b(5) liability). In Brophy, the plaintiff alleged that the insider
 17 defendant had knowledge of the corporation’s plan to buy back its own stock on certain
 18 prearranged dates. 70 A.2d at 6. The plaintiff further alleged that the defendant breached a
 19 duty of trust to the corporation by purchasing shares of the corporation’s stock for himself
 20 just before the buy-back and then selling the shares after the buy-back for a profit. Id.
 21 Plaintiffs’ reliance on Brophy is misplaced. In Freeman, the Seventh Circuit examined the
 22 continued viability of Brophy in 1978 and reasoned that allowing derivative common law
 23 claims for insider trading would create the problem of double liability because a statutory
 24 remedy was available under Rule 10b(5). 584 F.2d at 195-96. The Freeman Court also
 25 distinguished Brophy on the grounds that, at least implicitly, the Brophy Court recognized
 26

1 that the corporation did suffer potential harm in becoming a competitor in the market for its
 2 own stock with the insider defendant who purchased shares contemporaneously. Id. at 194.

3 Plaintiffs also cite an inapposite section of Fletcher's treatise on corporations, which is
 4 inconsistent with the section relating specifically to the insider trading cases cited above. See
 5 Pls.' Opp., at 14 (citing FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS at
 6 § 888). Finally, Plaintiffs cite the Zimmerman II Court's conclusion that the plaintiff had
 7 adequately pled an insider trading claim where defendants sold approximately \$248 million
 8 in Priceline stock with the knowledge that Priceline's business relationship with WebHouse
 9 was not succeeding. 2005 Del Ch. Lexis 135 at *8 n.84 (2005) (unpublished).

10 The Individual Defendants' argument with regard to the unavailability of insider
 11 trading derivative claims has merit. The Court finds persuasive the Seventh Circuit's
 12 reasoning that Brophy is no longer relevant in this context because it was decided well before
 13 private causes of action were available to individual shareholders under Rule 10b(5). There
 14 is also no dispute that Washington State case law acknowledges the general requirement that
 15 damages are an essential element of derivative claims for breach of fiduciary duties and
 16 unjust enrichment. Thus, although it is an open question, the Court also concludes that the
 17 Washington State courts would decline to adopt a common law derivative claim for insider
 18 trading where there is no allegation of damage to the nominal defendant corporation.

19 The Court GRANTS the Individual Defendants' motion to dismiss Counts I (breach of
 20 fiduciary duties by insider selling defendants) and VI (unjust enrichment) of the VADC for
 21 this reason as well.

22 **C. Failure to Adequately Plead Damages (Counts II-V)**

23 The Individual Defendants contend that Counts II (breach of fiduciary duties), III
 24 (abuse of control), IV (gross mismanagement) and V (corporate waste) must be dismissed
 25 because the VADC fails to allege any recoverable damages. Counts II through IV simply
 26 state that Cray has "sustained significant damages." VADC ¶¶ 129, 133, 138. Count V

1 alleges that the Individual Defendants caused Cray to waste corporate assets by “paying
 2 incentive based bonuses to certain of its executive officers and incur [sic] potentially millions
 3 of dollars of legal liability and/or legal costs to defend defendants’ unlawful actions.” Id. ¶
 4 142. Plaintiffs’ opposition brief suggests that these claims are based on allegations that Cray
 5 sustained damages in the form of (1) costs incurred to carry out internal investigations of,
 6 and defend against, potential legal liability from the pending class action lawsuit, and (2)
 7 harm to Cray’s corporate image and good will that impairs Cray’s ability to raise equity
 8 capital or debt. Id. ¶¶ 38-39, 104. The Individual Defendants maintain that these damage
 9 allegations are speculative and unrecoverable.

10 **1. Costs of Investigating and Defending Class Action**

11 The Individual Defendants rely on several cases holding that legal costs and potential
 12 legal liability arising out of a separate class action suit are not recoverable damages in a
 13 derivative action. See Defs.’ Mot., at 10. For example, in In re Symbol Technologies
 14 Securities Litigation, the complaint alleged as damages that the corporation might be “caused
 15 to pay amounts with regard to the claims asserted in the Class Action, or [] caused to pay any
 16 legal fees and incidental expenses in connection with defending such claims.” 762 F. Supp.
 17 510, 516 (E.D.N.Y. 1991). The District Court in Symbol deemed such damages
 18 unrecoverable because they were contingent on the outcome of a class action suit in which no
 19 judgment had been entered or settlement reached. Id. The Individual Defendants provide
 20 four other unpublished district court cases applying the same reasoning. See Dollens v.
 21 Zionts, 2002 WL 1632261 *9 (N.D. Ill. 2002); In re United Telecomms., Inc., Sec.
 22 Litigation, 1993 WL 100202 *3 (D. Kan. 1993); Daisy Sys. Corp. v. Fiengold, 1988 WL
 23 166235 *4 (N.D. Cal. 1988); Falkenberg v. Baldwin, 1977 WL 1025 *4 (S.D.N.Y. 1977).

24 In response, Plaintiffs cite only a single unpublished case attached as a slip opinion to
 25 their Response brief. See Mehlenbacher v. Jitaru, Case No. 04-cv-1118-Orl-22KRS (M.D.
 26 Fl. June 6, 2005). In Mehlenbacher, the plaintiff brought an indemnity and contribution

1 claim alleging damages for legal costs incurred by “the SEC investigation, the securities
 2 fraud class actions, and the internal investigations of the Company.” Slip Op. at 10. The
 3 class action had been voluntarily dismissed without payment of settlement. Id. at 9. Without
 4 discussion or citation to analogous cases, the District Court in Mehlenbacher simply
 5 concluded that “Count II may not be a model of pleading, but it does pass muster under the
 6 liberal Fed. R. Civ. P. 8(a) standard.” Id. at 10. Mehlenbacher is not instructive due to its
 7 lack of analysis or support. In contrast, Symbol Technologies, Dollens, United
 8 Telecommunications, Daisy Systems, and Falkenberg each held that derivative claims are
 9 foreclosed when they merely allege damages based on the potential costs of investigating,
 10 defending, or satisfying a judgment or settlement for what might be unlawful conduct. The
 11 Court concludes that Plaintiffs’ damage allegations based on potential costs of the class
 12 action suits are insufficient to state a claim for relief.

13 2. **Loss of Goodwill and Increased Financing Costs**

14 The Individual Defendants argue that Plaintiffs cannot recover damages based on
 15 allegations of lost goodwill and a “liar’s discount” that will potentially increase the costs of
 16 obtaining financing. VADC ¶¶ 39, 104, 142. Again, the Individual Defendants rely on
 17 Symbol Technologies and similar cases which dismissed claims for such damages. 762 F.
 18 Supp. at 517 (allegation that defendants undermined the company’s credibility in the
 19 marketplace was “boilerplate” and insufficient to withstand motion to dismiss). See also
 20 United Telecomms., 1993 WL 100202 at *2; Dollens, 2002 WL 1632261 at *9.

21 In response, Plaintiffs cite only the unpublished Cement-Lock v. Gas Technology
 22 Institute, 2005 WL 2420374 at *13 (N.D. Ill. 2002), in which the plaintiff alleged the
 23 following damages:

24 (1) misappropriation of millions of dollars in grant money, which prevented the
 25 development of the Technology and results in the future loss of profits from the
 26 licensing of the Technology; (2) *harm to Cement-Lock Group’s business*
reputation; (3) lost business opportunities to market the Technology to other
 individuals, corporations, or governmental entities, including Taiwan, Hong
 Kong, and China; and (4) devaluation of Cement-Lock Group’s intellectual

1 property by wasted years in the lifespan of certain patents and confusion and
 2 infringement on the Technology's service mark and trademark.

3 (Emphasis added). With reference to all of these allegations, the Cement-Lock Court stated
 4 only: "Such damages are neither speculative nor remote. Under the common law, concrete
 5 injury to business reputation will satisfy the injury element of standing." Id.

6 While there is some inconsistency in the case law (i.e., Symbol Technologies, United
 7 Telecommunications, and Dollens versus Cement-Lock), the weight of authority suggests
 8 that lost goodwill and business reputation damage allegations must be more than speculative
 9 and conclusory. Moreover, Cement-Lock is in agreement to a degree, requiring "concrete"
 10 injury to a corporation's business reputation. Here, Plaintiffs bring only a single allegation
 11 that specifies any present damage to Cray. VADC ¶ 104 (alleging that "the fees, interest
 12 rates and terms" of a June 1, 2005, credit agreement "were far less favorable than those that
 13 would have been available to a well managed company with established and fully
 14 functioning internal financial controls"). This allegation is conclusory, failing to identify the
 15 fees, interest rate or terms, or to provide any explanation as to how the credit agreement was
 16 unfavorable. Accordingly, the Court concludes that Counts II through V fail to identify
 17 recoverable damages for loss of goodwill or business reputation and GRANTS the Individual
 18 Defendants' motion to dismiss without prejudice for this reason as well.

19 **D. Failure to Allege Waste of Corporate Assets (Count V)**

20 Finally, the Individual Defendants contend that Plaintiffs' claim for waste of corporate
 21 assets (Count V) should also be dismissed for failure to state a claim under Rule 12(b)(6).
 22 Corporate waste is defined as "an exchange of corporate assets for consideration so
 23 disproportionately small as to lie beyond the range at which any reasonable person might be
 24 willing to trade." Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997). In this case,
 25 Plaintiffs allege that the Individual Defendants caused Cray to engage in corporate waste "by
 26 paying incentive based bonuses to certain of its executive officers and incur [sic] potentially

1 millions of dollars of legal liability and/or legal costs to defend defendants' unlawful
 2 actions." VADC ¶ 142. The Individual Defendants argue that this claim must fail because
 3 (1) there is no allegation the bonuses were made without consideration or constituted a gift,
 4 and (2) there is no allegation that the costs associated with defending the pending legal
 5 actions are egregious or irrational. See Lewis, 699 A.2d at 336 (no corporate waste where
 6 any substantial consideration was received by the corporation); White v. Panic, 783 A.2d
 7 543, 554 n.36 (Del. 2001) (corporate waste claim requires plaintiff to show (and by
 8 implication allege) that the board's decision was egregious and irrational). Plaintiffs provide
 9 no opposition to this argument. Because the corporate waste allegation is unsupported and
 10 there is no opposition from the Plaintiffs, the Court GRANTS the Individual Defendants'
 11 motion to dismiss Count V without prejudice.

12 **CONCLUSION**

13 For the reasons stated above, the Court rules as follows:

14 The joint motion by Cray and the Individual Defendants to dismiss for failure to
 15 comply with the pre-litigation demand requirement, docket no. 18, is GRANTED and the
 16 VADC is DISMISSED WITHOUT PREJUDICE.

17 The Individual Defendants' motion to dismiss for failure to comply with Rule 9(b),
 18 docket no. 16, is GRANTED IN PART and DENIED IN PART. The motion is GRANTED
 19 as to specific allegations of fraud and misrepresentation and those claims are DISMISSED
 20 WITHOUT PREJUDICE. The motion is DENIED as to the request to dismiss Counts I
 21 through VI in their entirety.

22 The Individual Defendants' motion to dismiss Counts I and VI for failure to state
 23 breach of fiduciary duty and unjust enrichment claims on the basis of insider selling, docket
 24 no. 16, is GRANTED. Counts I and VI are DISMISSED WITH PREJUDICE.

25 The Individual Defendants' motion to dismiss Counts II through V, docket no. 16, is
 26 GRANTED. Counts II through V are DISMISSED WITHOUT PREJUDICE.

1 IT IS SO ORDERED.
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DATED this 27th day of April, 2006.

4 s/ Thomas S. Zilly
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THOMAS S. ZILLY
United States District Judge

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